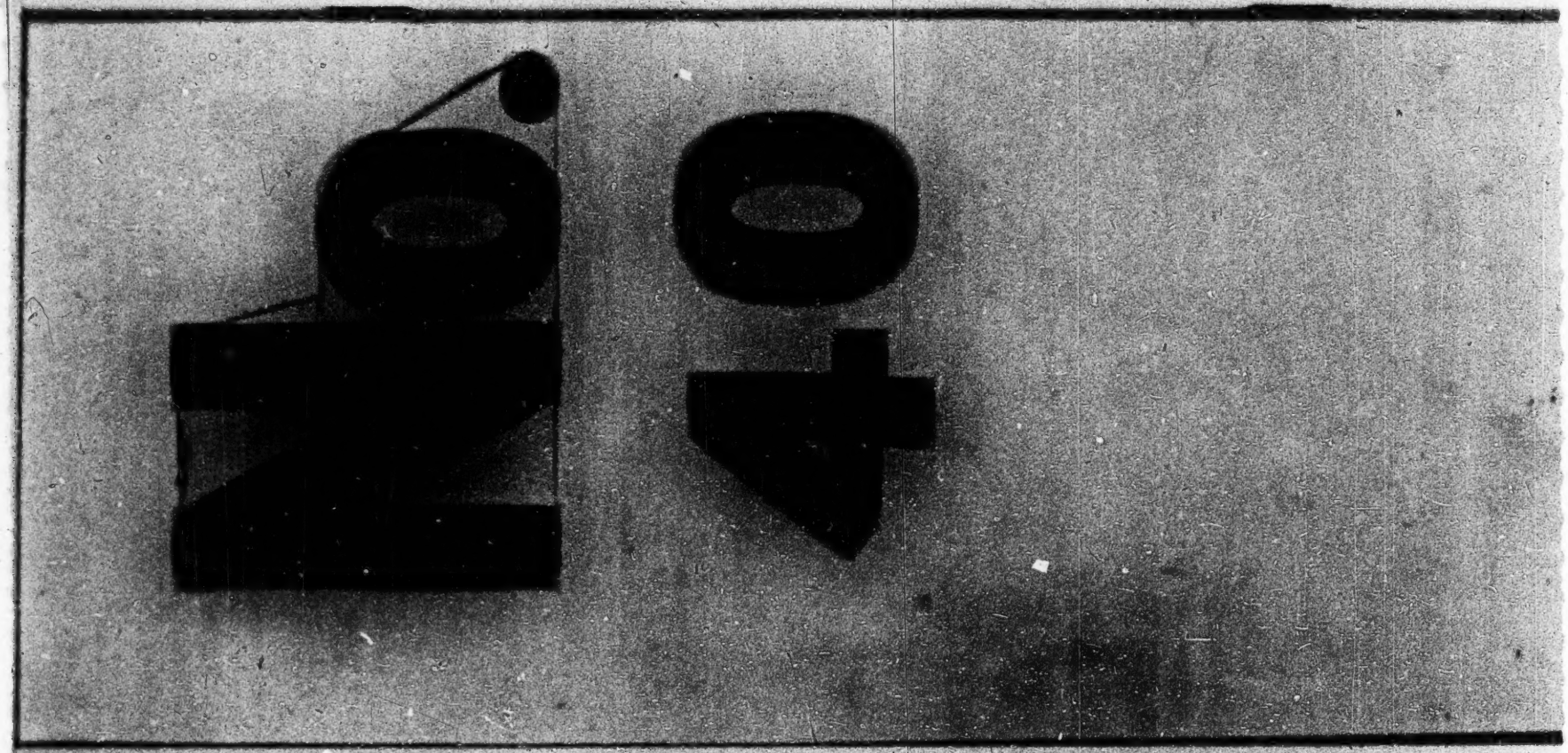

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~928~~ 40

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

THE CAPITAL TRANSIT COMPANY, THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE PEOPLE'S COUNSEL OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN O'DEA,
People's Counsel, Public Utilities Commission of the District of Columbia.

INDEX

Subject Index

	Page
Statement of the People's Counsel opposing jurisdiction and motion to dismiss or affirm	1

Table of Cases Cited

New York Central R. Co. v. *Mohney*, 252 U. S. 152	5
North Carolina v. *United States*, 325 U. S. 511	10
United States v. *Capital Transit Company*, 325 U. S. 357	3
United States v. *Yellow Cab Co.*, 332 U. S. 218	4

Statutes Cited

Act of March 4, 1913:	
Par. 24, Section 8, 37 Stat. 981, Ch. 150	11
Par. 28, Section 8, 37 Stat. 981, Ch. 150	11
Par. 96, Section 8, 37 Stat. 995, Ch. 150	2
District of Columbia Code:	
Sections 43-101 to 1007	2
Section 43-122	2
Section 43-207	3
Section 43-323	11
Interstate Commerce Act:	
Section 202 (b) (49 Stat. 302 b)	5
Section 203 (a) (8) (49 Stat. 303 (a) 8)	6
Section 203 (b) (8) (49 Stat. 303 (b) 8)	6
Section 216 (3) 49 Stat. 316 e)	7, 9

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2496-47

CAPITAL TRANSIT COMPANY, A CORPORATION, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

Civil Action No. 3052-48

CAPITAL TRANSIT COMPANY, A CORPORATION, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants

CONSOLIDATED CAUSES

STATEMENT OF PEOPLE'S COUNSEL AS TO JURISDICTION, INCLUDING MOTION TO DISMISS OR AFFIRM.

The People's Counsel, Public Utilities Commission, District of Columbia, on behalf of the interests of the users of the service furnished by the Capital Transit Company, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal,

files this, his statement in opposition to appellants' statement as to jurisdiction. People's Counsel includes herein his motion to dismiss the appeal or in the alternative to affirm the judgment of the District Court on the ground that the questions raised on behalf of appellants are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, People's Counsel asserts that the unsubstantial character of the grounds stated by appellants is so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this stage of the proceeding.

The matters herein relied upon by the People's Counsel are more particularly stated below:

I. Congress has fixed the authority for the regulation of rates, fares, charges and compensation for the transportation of passengers from one point to another within the District of Columbia in the Public Utilities Commission of the District of Columbia (37 Stat. 974; Section 43-101 to 1007 of the 1940 District of Columbia Code). The jurisdiction of the Public Utilities Commission of the District of Columbia was specifically made applicable "to the transportation of passengers * * * from one point to another within the District of Columbia, and any common carrier performing such service * * *" (37 Stat. 977; Section 43-122, of the 1940 District of Columbia Code).

The regulatory jurisdiction of the Public Utilities Commission of the District of Columbia over the transfer arrangements and street car service in such transportation within the District by Capital Transit Company was transferred from the Interstate Commerce Commission to the Public Utilities Commission of the District of Columbia by virtue of Section 8, Paragraph 96 of the Act of March 4,

1913, 37 Stat. 995, Ch. 150 (Section 43-207 of the 1940 District of Columbia Code).

II. The entire transportation furnished by the Capital Transit Company involved in the orders of the Interstate Commerce Commission is from one point to another within the District of Columbia and therefore is not interstate transportation.

The Supreme Court, in *United States* v. *Capital Transit Company*, 325 U. S. 357, 363, in holding that the operation of the Capital Transit Company was interstate commerce, said that interstate journeys are to be measured by "the commonly accepted sense of the transportation concept." In writing for the Court, Mr. Justice Black pointed out that Capital Transit is "one of the four companies transporting passengers to and from the Virginia government agencies"; that "it accorded to its own bus and streetcar passengers, but denied to passengers on other Virginia buses, a privilege of transfers to and from some of its Virginia buses which lowered the total fares between District residences and their Virginia places of work" (325 U. S. 359); that it "uses streetcars and buses as an integrated unit in carrying out interstate transportation" (325 U. S. 363); that "itself • • • conducted its own traffic to and from Virginia and District residential points as one continuous journey"; that "• • • a Virginia worker could board its local bus or streetcar, ride to a District terminal of Transit's Virginia bound bus, board it, and obtain the benefit of a transfer supplied by Transit. So also could Transit's passengers get the benefit of a transfer on the return journey home from work" (325 U. S. 364).

None of the facts enumerated by Mr. Justice Black are the facts today. The Interstate Commerce Commission found that "on March 31, 1947 the Transit Company discontinued physical operations in Virginia in connection

with the transportation of passengers between points in the District and the Pentagon Building." Thus there is no evidence to substantiate the finding of the Commission (270 I. C. C. 656) that "the evidence received on further hearing shows that there has been no change in the essential circumstances" since the decision of this Court in *United States* v. *Capital Transit Company, supra.*

In *United States* v. *Yellow Cab Company*, 332 U. S. 218, the Supreme Court, in holding that local taxicab service was not interstate commerce, said:

> "The interstate commerce toward which this aspect of the conspiracy is directed is claimed to arise out of the following facts. Many persons are said to embark upon interstate journeys from their homes, offices and hotels in Chicago by using taxicabs to transport themselves and their luggage to railroad stations in Chicago. Conversely, in making journeys from other states to homes, offices and hotels in Chicago, many persons are said to complete such trips by using taxicabs to transport themselves and their luggage from railroad stations in Chicago to said homes, offices and hotels. Such transportation of persons and their luggage is intermingled with the admittedly local operations of the Chicago taxicabs. But it is that allegedly interstate part of the business upon which rests the validity of the complaint in this particular.
>
> "We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part

of the railroad fares. In short, their relationship to interstate transit is only casual and incidental."

The Capital Transit Company street cars and busses in transporting the passengers involved in this case cross no state lines; their service is confined to transportation from one point to another within the District of Columbia. None of these street cars and busses serves only passengers desiring further transportation in Virginia, all of them being required to serve every person within the limits of the District of Columbia. Capital Transit Company has no voluntary contractual or other arrangement with the interstate busses of the Virginia Companies. Nor are the fares paid to the Capital Transit Company paid or collected as part of the Virginia Companies' fares. The relationship of the transportation furnished by Capital Transit Company to interstate transit is only casual and incidental. The intention of the passenger as to his ultimate destination does not determine whether a conveyance is being used in interstate or intrastate transportation (*New York Central R. Co.* v. *Mohney*, 252 U. S. 152, 157). Interstate journeys are to be measured by the commonly accepted sense of the transportation concept (*United States* v. *Capital Transit Company, supra*). In this independent local service, the service rendered by the Capital Transit Company is not an integral part of interstate commerce any more than the local taxicabs which merely convey interstate train passengers between their homes and the railroad station.

III. Part II of the Interstate Commerce Act provides that the Interstate Commerce Commission shall not have the power to regulate intrastate transportation.

Section 202 (b) (49 Stat. 302 b) provides that:

"Nothing in this part shall be construed • • • to interfere with the exclusive exercise by each State of

> the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Section 203 (a) (8) (49 Stat. 303 (a) 8) provides that the term "state" shall include the District of Columbia.

Section 216 (e) (49 Stat. 316 (e)) which gives the Interstate Commerce Commission authority to regulate rates over motor carrier operations provides that:

> "* * * Provided, however, That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any purpose whatever."

Since the service rendered by Capital Transit Company is intrastate and has been so found by the Court which followed the opinion of the Supreme Court in *United States* v. *Yellow Cab Company, supra*, the Court properly found that the Interstate Commerce Commission has no jurisdiction to regulate this rate of fare.

IV. In Part II of the Interstate Commerce Act, Congress has excluded local transportation of passengers in interstate commerce from the jurisdiction of the Interstate Commerce Commission except in two instances which are not applicable to the facts as found by the Court in this case.

Congress, in reserving to the Interstate Commerce Commission power to regulate the reasonableness of interstate rates, has denied the Commission authority to regulate rates for local interstate transportation of passengers by motor vehicle within the District of Columbia and a zone adjacent to and commercially a part of the District of Columbia and all contiguous municipalities, where the carrier is also lawfully engaged in intrastate transportation over the entire length of its routes used for interstate

transportation, except (1) where local interstate transportation is "under a common control, management, or arrangement for a continuous carriage" to or from a point without the District or the adjacent commercial zone, or (2) "to the extent the Commission shall from time to time find that" the application of the Act "is necessary to carry out the national transportation policy declared in" the Interstate Commerce Act (Sec. 203 (b) (8)—49 Stat. 303 (b) (8)). If it is assumed that this local transportation of passengers is in interstate commerce its regulation is excluded from the authority of the Interstate Commerce Commission since there is no evidence in the record of any voluntary contractual or other arrangement between the Capital Transit Company and the Virginia companies or any arrangement for a continuous carriage to or from a point without the District or the adjacent commercial zone. The evidence is quite the contrary (pp. 1474, 1476, 1746, Transcript of Hearing, I. C. C. Docket # 28991, November 19 and 20, 1947; pp. 2076, 2110-2113, Transcript of Hearing, I. C. C. Docket # 28991, December 15, 1947). The Court has found that all of the transportation is from one point to another within the District of Columbia. The Capital Transit Company is engaged in intrastate transportation over the entire length of its routes.

There is no basis for the finding by the Interstate Commerce Commission that regulation is necessary in order to carry out the national transportation policy.

In *United States* v. *Capital Transit Company, supra*, the Supreme Court said:

> "It is to be remembered that these were interstate rates for interstate travel which applied almost exclusively to workers engaged in national defense. Neither the District nor Virginia had power adequately to regulate the rates; nor had they attempted to do so. Their regulation was rightfully a matter of concern to Army

and Navy Departments charged with serious responsibility of conducting a war. The employees worked in the very center of activities essential in that cause. Congress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates in the light of the needs of national defense. The findings of the commission on this issue were clear and complete, cf. City of Yonkers v. United States, 320 U. S. 685, 64 S. Ct. 327, 88 L. Ed. 400, and justified the Commission in exercising its jurisdiction."

In its opinion of July 7, 1948, (270 I. C. C. 657) the Interstate Commerce Commission says:

"Respondents and the District commission lay emphasis upon the termination of hostilities as establishing that there is no longer any need for the exercise of our regulatory authority. As to this it need only be pointed out that the national transportation policy contemplates a national transportation that will, among other things, meet the needs of national defense, and it applies in peacetime as well as in wartime."

In *United States* v. *Capital Transit Company, supra,* the Supreme Court pointed out that the Interstate Commerce Commission had determined, from the record, that the war effort had been hampered by the dissatisfaction of the employees who used Capital Transit Company facilities to take them to the Army and Navy buildings in Virginia. No employee in the national military establishment using trans-Potomac service testified that he or she is dissatisfied with the present fares.

The Interstate Commerce Commission found that "at the last further hearing, the director of civilian personnel of the Army Department was called as a witness. His testimony was along the same lines as the evidence presented by the Departments at the prior hearings" (270 I. C. C. 657). His testimony was that he did not intend to have it under-

stood that the matter of fare was a major factor in the Army's ability to recruit personnel (pp. 1860, 1861, Transcript of Hearing, I. C. C. Docket # 28991, November 21, 1947).

This is not evidence that the war effort is being hampered by the inability of the War and Navy Departments to keep its employees because of the dissatisfaction with the transportation charges. There was such evidence in *United States* v. *Capital Transit Company, supra*, but it is not the evidence in this case.

This is certainly not the clear finding, supported by evidence, required by the Supreme Court to sustain the authority of the Interstate Commerce Commission to regulate purely intrastate rates.

Congress, by Section 203 (b) (8) of the Interstate Commerce Act (49 Stat. 303 (b)(8)) has made it mandatory that the Interstate Commerce Commission shall "from time to time find that such application is necessary to carry out the national transportation policy declared in" the Act. There is no evidence in this case that a war effort has been hampered. There are no facts to substantiate the conclusion of the Commission that, under the facts in this case, the national transportation policy contemplates a national transportation system that will, among other things, meet the needs of national defense, and that it applies in peacetime as well as in wartime. Facts which were controlling when *United States* v. *Capital Transit Company, supra*, was decided, having changed, cannot be made the basis for authority today.

The Interstate Commerce Commission is without authority to supplant this intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission and justification for the exercise of the federal power must clearly appear.

In *North Carolina* v. *United States*, 325 U. S. 511, the Supreme Court said:

> "Intra-state transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. American Exp. Co. *v.* South Dakota, 244 U. S. 617, 625, 61 L. Ed. 1352, 1358, 37 S. Ct. 656, P. U. R. 1917F 45. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty.' Illinois C. R. Co. *v.* State Pub. Utilities Commission, 245 U. S. 493, 510, 62 L. Ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C 1279. Before the Commission can nullify a state rate, justification for the 'exercise of the federal power must clearly appear.' Florida *v.* United States, 282 U. S. 194, 211, 212, 75 L. Ed. 291, 301, 302, 51 S. Ct. 119. See also Yonkers *v.* United States, 320 U. S. 685, 88 L. Ed. 400, 64 S. Ct. 327. And the intention to interfere with the state's rate-making function is not to be presumed, Arkansas R. Commission *v.* Chicago, R. I. & P. R. Co., 274 U. S. 597, 603, 71 L. Ed. 1224, 1228, 47 S. Ct. 724; nor must its intention in this respect be left in serious doubt. Illinois Commerce Commission *v.* Thompson, 318 U. S. 675, 684, 685, 87 L. Ed. 1075, 1081, 1082, 63 S. Ct. 834. The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intra-state rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission. * * *"

V. The order of the Interstate Commerce Commission results in discrimination which is prohibited by the Act of Congress creating the Public Utilities Commission for the District of Columbia.

Section 8, Par. 24 of the Act of March 4, 1913, 37 Stat. 981, Ch. 150 (Section 43—323 of the 1940 District of Columbia Code) provides in pertinent part:

> "That every public utility shall file with the commission * * * schedules * * *, showing all rates, tolls, and charges which it has established and which are in force at the time for any service performed by it in the District of Columbia * * *. The rates, tolls and charges, shown on such schedules, shall not exceed the rates, tolls, and charges now allowed by law, and shall be the lawful rates, tolls, and charges within the District of Columbia, and shall remain and be in force until set aside by the Commission."

Section 8, Par. 28 of the Act of March 4, 1913, 37 Stat. 981, Ch. 150 (Section 43—329 of the 1940 District of Columbia Code) provides:

> "That it shall be unlawful for any public utility to charge, demand, collect, or receive a greater or less compensation for any service performed by it within the District of Columbia, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect, or receive any rate, toll, or charge not specified in such schedules. The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges until the same are changed as provided in this section."

The order of the Interstate Commerce Commission results in discrimination against other passengers using the facilities of Capital Transit Company within the District who do not use the joint rate to the Virginia installations, and it constitutes a preference to those passengers using such facilities in travelling to and from the designated points in Arlington County.

Why should this small segment of the passengers of the Capital Transit Company be favored over the majority? This is the discrimination prohibited by the aforementioned Act of Congress which created the Public Utilities Commission.

WHEREFORE, The People's Counsel respectfully submits this statement showing that questions upon which the decision of this cause depends are so unsubstantial as not to need further argument, and People's Counsel respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the decree of permanent injunction entered below.

Respectfully submitted,

JOHN O'DEA,
People's Counsel, Public Utilities Commission of the District of Columbia.

Dated this 18th day of February, 1949.